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In The

Supreme Court of the United States

October Term, 1960

No. 398

ARTHUR K. WURDEMANN AND WURDEMANN-HJELM CORPORATION,

Petitioners,

vs.

CLIFFORD R. HJELM, DAVID R. HJELM AND THE JESMER CORPORATION,

Respondents.

(And three other cases consolidated for trial.)

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

REPLY OF PETITIONERS TO BRIEF OF THE JESMER CORPORATION IN OPPOSITION

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TABLE OF CONTENTS

	Page
1. Jurisdiction	1
2. Federal Question of Substance Was Presented to the Minnesota Courts and Petitioners Were Denied Due Process by the Minnesota Supreme Court	3

AUTHORITIES CITED

Cases:

	Page
Beaupre v. Noyes, 138 U.S. 402, 11 S.Ct. 296	3
Dept. of Banking v. Pink, 317 U.S. 264	1
Fox Film Corporation v. Muller, 294 U.S. 696, 55 S.Ct. 444	2, 3
Gypsy Oil Co. v. Escoe, 275 U.S. 499	1
Holtsberg v. Bommersbach, 235 Minn. 553, 51 N.W.2d 586	5
Rochin v. California, 342 U.S. 165, 72 S.Ct. 205	4
Rust Land Co. v. Jackson, 250 U.S. 72	1

Miscellaneous:

Rule 58.01, Rules of Civil Procedure for the District Courts of Minnesota	2
Minnesota Statutes Annotated, 1959 Pocket Part, Vol. 27A, page 16	2

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REPLY TO OBJECTIONS OF RESPONDENT JESMER CORPORATION

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1. JURISDICTION

The objection as to timeliness is based on three cases cited by respondent (page 6):

Rust Land Co. v. Jackson, 250 U.S. 72.

Gypsy Oil Co. v. Escoe, 275 U.S. 499.

Dept. of Banking v. Pink, 317 U.S. 264.

In each of these cases, judgment was entered in the trial court and an appeal was then taken from the judgment to the highest state court, where the judgment was in each instance affirmed. The United States Supreme Court held that the time to apply for certiorari was 90 days after the affirmance of the judgment by the highest state court.

To bring the case at bar within those decisions, respondent incorrectly states (at page 4) that "an appeal was taken by Wurdemann from that judgment to the Minnesota Supreme Court", and that "the Minnesota Supreme Court by its opinion of March 18, 1960, affirmed the judgment."

The opinion of the Minnesota Supreme Court attached to our Petition as Exhibit A, on its face states in its opening sentence (at page 22) that

> "This is an appeal from an order denying plaintiffs' motion for amended findings or for a new trial."

That was the only appeal made (R. 126).

The judgment entered in the State District Court on June 13, 1960, which was the only judgment entered in this cause on the merits thereof, was entered after the State Supreme Court affirmed the order appealed from denying our motions for a new trial.

Rule 58.01 of the *Rules of Civil Procedure for the District Courts of Minnesota*, as amended effective July 1, 1959, Volume 27A, *Minnesota Statutes Annotated*, 1959 Pocket-part, page 16, provides (so far as applicable) as follows:

> "* * * judgment * * * upon an order of the court * * * that all relief be denied shall be entered forthwith by the clerk. * * * The judgment in all cases shall be entered and signed by the clerk in the judgment book; this entry constitutes the entry of the judgment; and the judgment is not effective before such entry. A copy thereof, also signed by the clerk, shall be attached to the judgment roll."

If we had applied for certiorari before that judgment was entered, it would have been denied in the same manner as the Petition was denied in *Fox Film Corporation v. Muller*, 294 U.S. 696, 55 S.Ct. 444, where the writ was dismissed because it had been improvidently granted after affirmance by the Minnesota Supreme Court's denial of plaintiff's motion for a

new trial in the lower court, but before the entry of the final judgment in the State District Court.

The *Fox Film* case, supra, cites as its authority *Beaupre v. Noyes*, 138 U.S. 402, 11 S.Ct. 296, which holds, in the last paragraph thereof, that "the denial of a new trial is not a final judgment of the State Court within the meaning of the Act of Congress", and that the Supreme Court of the United States "has no jurisdiction to review such an order."

2. A FEDERAL QUESTION OF SUBSTANCE WAS PRESENTED TO THE MINNESOTA COURTS AND PETITIONERS WERE DENIED DUE PROCESS BY THE MINNESOTA SUPREME COURT

It is asserted by respondent in Points 2 and 3 of its Brief in Opposition herein, as reason for denying the writ that no federal question of substance was presented to the Minnesota courts, that the decision of no federal question was necessary to the determination of the cause, and that petitioners were not denied due process by the Minnesota Supreme Court, "unless the claim can be supported by pointing to a substantial deviation from the record."

Of course, the due process clause of the Fourteenth Amendment governs and applies to the decisions of state questions as well as federal questions.

We pointed out and enumerated in our Petition for Certiorari all the questions which were necessary to a decision of this case, and without passing on which, no decision could be made; and we then pointed out that, in each instance, the State Supreme Court had inverted the evidence appearing in the record on appeal, and in many places supplied evidence not in the record at all.

It was only after the State Supreme Court's decision was made that we first could, and did, find out what had been done; and we thereupon filed our Petition for Rehearing, where we first could, and did, call these errors to the Minne-

sota Supreme Court's attention as violations of the Fourteenth Amendment to the Federal Constitution, in the following language, at page 24 of our Petition for Rehearing, to-wit:

> "The point is that the Court, in its Opinion, is dealing with the facts not as they were certified to it by the court below in the Record before the Court.
>
> "We respectfully submit that it is a lack of due process under the 14th Amendment to the Constitution of the United States for this Court to ignore the facts as certified to it by the lower court and pass on statements of facts never submitted to it as an appellate court, nor appearing in the Record of the court below. And it is also respectfully submitted that the plaintiffs are thereby being denied the equal protection of the law, contrary to the said 14th Amendment, since it is the law of the State of Minnesota, that, in a matter such as this, the Supreme Court is an appellate court and is restricted to passing on the questions appearing in the evidence as certified to it by the trial court."

This Petition was denied without opinion.

Weren't these "substantial deviations from the Record"?

When, before this State Supreme Court's decision was rendered, could we have raised this question of due process?

Were we bound to assume that a State Supreme Court was going to "substantially deviate" from the Record?

We do not claim that the Constitution guarantees that the decisions of the State Court will be free from error. We do claim that the "due process" clause of the Fourteenth Amendment guarantees that all decisions, state as well as federal, be "based on the disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated on the detached consideration of conflicting claims.", *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205.

It should be noted here that petitioners did not claim in their Petition for Certiorari that the State Supreme Court violated due process by refusing or failing to re-open the

case, but claimed that the State Supreme Court incorrectly stated that our motion to take the additional testimony given by David R. Hjelm and the applications for F.H.A. loans was to prove the conviction of Clifford Hjelm; whereas the undisputed record (p. 117, ff. 2-3) showed that David Hjelm's testimony proffered was that the $100,000 named as the purchase price in Exhibit B was, in fact, "amortized down", "a reduced option" by "making the contract payments", set forth in the Lease, Exhibit A, and Record, page 111; the application signed by Clifford Hjelm on February 6, 1957, that he had purchased 106 North Smith Street, St. Paul (the Piedmont Apartments) on December 31, 1954, and the price paid was $450,000. There was nothing in that proferred evidence to show the conviction of Clifford Hjelm.

We pointed out in our Petition for Rehearing, at page 1 thereof, that

> "It is impossible for anyone knowing the facts of the above cases, as certified to the Supreme Court by the District Court, to read the Supreme Court's Opinion and come to the conclusion that the Supreme Court's Opinion is dealing with all the material facts certified by the District Court appealed from. The decision of the Supreme Court is not based on the evidence actually presented to the trial court as shown by the Record on appeal, in accordance with this Court's appellate jurisdiction as stated in *Holtsberg v. Rommersbach*, 235 Minn. 553, 51 N.W.2d 586.
>
> "Appellants believe and urge that the Opinion and Decision are based on evidence directly contrary to the evidence actually presented to the trial court."

We pointed out that although the Record (R. 853, f. 1) shows Mr. Stacker testified, on direct examination as a witness for The Jesmer Corporation, that before the execution of Exhibit BB on June 29th he even told both Jesmer and his attorney, Mr. Ames, *what* Cliff (Clifford Hjelm) would testify, and Clifford testified (R. 397, f. 2) that he had been

subpoenaed by Mr. Ames and cross-examined as an adverse witness at the Justice Court trial, yet the Supreme Court states in its Opinion that "Jesmer did not know, when he signed Exhibit BB, that Clifford Hjelm would testify at the unlawful detainer trial."

The same inversion of the facts is true with respect to the contents of Exhibit BB, whose stultifying effect and purpose is admitted by Stacker, Jesmer's witness, who negotiated it (see paragraph No. 2, at pp. 13-14 of our Petition for Certiorari). The State Supreme Court mis-states it as an agreement to pay Clifford a broker's commission out of the sale price of the Piedmont Apartments, if he found a buyer after Jesmer's winning the Justice Court case; whereas the falsity thereof is clear, as demonstrated at paragraph No. 1, pp. 12-13, of Petition for Certiorari.

Similarly, in describing the division of the $500,000 insurance proceeds in case of total destruction of the building, although the Record shows (R. 404, f. 3) that, in response to a question by the lower court, both Clifford Hjelm and Mr. Ames, attorney for Jesmer, confirmed the division of the insurance as stated in paragraph No. 4 of our Petition for Certiorari, the State Supreme Court again wholly ignores this record.

So, as recited in paragraph No. 5, page 15, Petition for Certiorari, the State Supreme Court charges us with violation of the mechanic's lien provision of Exhibit A, by ignoring and leaving out of the quoted provision thereof two very important words, to-wit, "before foreclosure".

Again, as stated in paragraph No. 6 of our said Petition, the State Supreme Court said that Jesmer learned of the assignment of Exhibits A and B to the Wurdemann-Hjelm Corporation in May, 1957, whereas the record shows that Jesmer said he saw Exhibit D in December, 1956 or February, 1957, which provided for the assignment of said Ex-

hibits A and B; and Clifford Hjelm testified that after Exhibit D was executed, he and his brother David operated the Piedmont as officers of the new corporation (R. 383, f. 2), and the record shows that the only purpose of Exhibit H, executed April 16, 1957, was to transfer the interest of the Hjelms in the Corporation (R. 383, ff. 2-3), which had already been made under Exhibit D (R. 383, f. 2).

Again, as stated in paragraph No. 7 of our said Petition, the State Supreme Court mis-states the plain reading of Exhibit H so as to charge Petitioners with the fraudulent intent to conceal their ownership of the Piedmont Apartments, whereas the record shows that Jesmer knew of the assignment of Exhibits A and B in December, 1956 or February, 1957 (R. 488, ff. 2-3).

Again, as stated in paragraph No. 8 of our Petition for Certiorari, the State Supreme Court mis-states as a fact the termination of Exhibits A and B, although the record shows affirmatively that no attempt was made, either by notice or by the action, to terminate.

And, again in paragraph No. 10 of our said Petition, the said Court held, not only contrary to its prior decision, but contrary to the express terms of both Exhibits A and B, that the mere breach of the lease ipso facto terminated both; whereas Exhibit A provided that it could only be terminated by written notice (page 8 our Petition for Certiorari), and Jesmer admitted the Justice Court action was brought without notice of any kind (top of page 9 of our said Petition); and neither the complaints nor the judgment in the unlawful detainer action claimed termination.

We do claim that while State Courts can determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process; and whether acting through its judiciary or legislature, a state may not deprive a person of all existing remedies for enforcement of a right which the state has no power to destroy.

This, the Supreme Court of Minnesota did effectively, when it mis-stated the evidence in each instance hereinabove cited, contrary to the record, and based its decision on that mutilated record. That is not law, but the exercise of arbitrary power!

We called this to the attention of the State Supreme Court at the first opportunity as violations of due process and the equal protection of the laws, under the Fourteenth Amendment, in our Petition for Rehearing. When, before then, could the question have been raised?

These were all substantial deviations from the Record, without which the decision in this case could not possibly have been made, except by violating said provisions of the Fourteenth Amendment.

It is therefore respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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